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Nos. 04-104 and 04-105

In the Supreme Court of the United States

UNITED STATES OF AMERICA, *Petitioner*,

v.

FREDDIE J. BOOKER, *Respondent*.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

UNITED STATES OF AMERICA, *Petitioner*,

v.

DUCAN FANFAN, *Respondent*.

On Writ of Certiorari Before Judgment to the United States Court of Appeals for the First Circuit

BRIEF OF FAMILIES AGAINST MANDATORY MINIMUMS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICUS CURIAE*[1]

Families Against Mandatory Minimums (FAMM) is a non-profit, nonpartisan organization dedicated to research, advocacy, and education of the public regarding the excessive social costs of mandatory minimum sentencing. Founded in 1991, FAMM has 30 chapters and 35,000 members nationwide. FAMM conducts sentencing workshops for its members, publishes a newsletter, maintains an extensive web site, serves as a sentencing clearinghouse for the media, and researches sentencing cases for *pro bono* litigation.

FAMM believes that punishment should be proportionate to the crime and the offender's culpability. FAMM opposes sentencing systems that rely on mandatory minimum statutes and mandatory sentencing rules. FAMM believes that such systems result in unduly harsh punishment while masking, and not adequately reducing, unwarranted sentencing disparities. Indeed, FAMM believes that such systems actually increase sentencing disparities in some respects.

FAMM supports non-binding federal guidelines that comply with the Sixth Amendment and ensure the procedural protections of the Fifth Amendment's Due Process Clause. Any such regime, in FAMM's view, must recognize the underlying importance of the jury's role, respect the historic sentencing discretion of Article III judges, incorporate effective standards of appellate review, and permit appropriate individualized treatment of criminal defendants while avoiding unwarranted sentencing disparities.

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[1] The parties' letters of consent to the filing of this brief have been lodged with the Clerk. Under Rule 37.6 of the Rules of this Court, *amicus curiae* states that no counsel for a party has written this brief in whole or in part and that no person or entity, other than *amicus curiae*, its members, or its counsel, has made a monetary contribution to the preparation and submission of this brief.

STATEMENT

A. In *Blakely* v. *Washington*, 124 S. Ct. 2531 (2004), this Court invalidated a sentence imposed under Washington's Sentencing Reform Act. The Court held that the imposition of the sentence violated the defendant's Sixth Amendment right to a jury trial because it was predicated on a factual finding made by the judge rather than by the jury. In so holding, the Court applied the rule articulated in *Apprendi* v. *New Jersey*, 530 U.S. 466, 490 (2000), that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Blakely*, 124 S. Ct. at 2536. The Court made clear that the "statutory maximum for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*" *Id.* at 2537 (emphasis in original).

B. Under the United States Sentencing Guidelines ("Guidelines" or "U.S.S.G."), a sentencing range may be determined primarily based on facts found by the sentencing judge alone. See Julie O'Sullivan, *In Defense of the U.S. Sentencing Guidelines' Modified Real Offense System*, 91 NW. U. L. REV. 1342, 1354 (1997). A sentencing range results from determining where, on a grid, a so-called "offense level" intersects with a defendant's criminal history category. Starting from a "base offense level" (derived at least in part from the offense of conviction), an adjusted offense level is calculated based on various judicial findings of fact, "many of which may require the consideration of nonconviction offense conduct." *Id.* at 1355; see Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises on Which They Rest*, 17 HOFSTRA L. REV. 1, 6 (1998).

The concept of "relevant conduct"—defined in U.S.S.G. § 1B1.3—underlies nearly all sentencing under the Guidelines. "Relevant conduct" includes conduct not proven to a jury or admitted by a defendant that the sentencing judge determines to

have been "part of the same course of conduct or common scheme or plan as the offense of conviction." U.S.S.G. § 1B1.3(a)(2). In cases like the ones before the Court, "relevant conduct" includes drug quantities. Those are aggregated under § 2D1.1(a)(3) to determine the base offense level—which increases as the drug quantity increases.[2]

Chapters Two and Three of the Guidelines Manual contain numerous other provisions under which a defendant's offense level may be increased based upon facts found by the sentencing judge. *E.g.*, U.S.S.G. § 2K2.1(c)(2) (providing that cross-reference to homicide guidelines (§ 2A1) applies at sentencing for firearm possession if "death resulted" from possession); *id.* § 3C1.1 (upward adjustment if the defendant obstructed justice). See generally U.S.S.G. § 1B1.1; Breyer, *supra*, 17 HOFSTRA L. REV. at 6-7. The end result of these calculations may subject a defendant to a sentence dramatically exceeding the sentence that he would be eligible to receive based solely on the jury's verdict or the defendant's admissions at a guilty-plea hearing. See, *e.g.*, *United States* v. *Washington*, 11 F.3d 1510, 1515 (10th Cir. 1993) ("relevant conduct increased defendant's sentencing range from 210-262 months (taking into account upward adjustments for role in the offense and obstruction of justice) to life imprisonment").[3]

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[2] Drug cases provide only one example of the "relevant conduct" principle in application. In economic crime cases, for instance, the base offense level is derived solely from the offense of conviction, but the "actual or intended loss" amount—which may be rather crudely estimated by the sentencing judge alone—is based upon "relevant conduct" and largely determines a sentence under § 2B1.1 as a "specific offense characteristic." See, *e.g.*, *United States* v. *Frank*, 354 F.3d 910, 927 (8th Cir. 2004) (affirming calculation of 12-offense-level increase based upon estimate of "intended pecuniary harm" that the district court characterized as a "reasonabl[e] and conservative[] guess").

[3] The burdens of proof that the lower courts have applied to judicial fact-finding under the Guidelines (with rare exceptions) resemble standards that govern civil cases. See, *e.g.*, *United States* v. *Lombard*, 102 F.3d 1 (1st Cir. 1996) (due process did not require sentencing court to apply any higher

Once the sentencing court determines the applicable guideline range, it must impose a sentence within that range "unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the [United States Sentencing Commission ('Commission')] in formulating the guidelines that should result in a sentence different from that described." 18 U.S.C. § 3553(b); see U.S.S.G. § 5K2.0. The Guidelines are thus "binding on federal courts." *Stinson* v. *United States*, 508 U.S. 36, 42 (1993). "A judge who disregards them will be reversed." *Mistretta* v. *United States*, 488 U.S. 361, 413 (1989) (Scalia, J., dissenting). In that regard, a detailed scheme of appellate review governs sentencing under the Guidelines. See 18 U.S.C. §§ 3742(a)(3), 3742(b)(3) (either party may appeal a sentence imposed outside the applicable guideline range); accord Kate Stith & Steve Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 WAKE FOREST L. REV. 223, 270 (1993) (noting how the appellate review provisions of the Sentencing Reform Act of 1984 expanded the category of illegal sentences from those that exceeded the statutory maximum to those "imposed in violation of duly promulgated regulations of the Commission"). Under the Guidelines, therefore, the maximum penalty authorized by the statute underlying the conviction is a maximum penalty "only in a formal sense," because the jury's verdict alone (or a defendant's admission) does not authorize the judge to impose a sentence at that level. *Ring* v. *Arizona*, 536 U.S. 584, 604 (2002).

The present cases are two examples, among innumerable others, of ones in which a Guidelines sentence was enhanced based on evidence of drug quantity calculated under

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standard of proof than preponderance of the evidence to find that defendant convicted of possessing a gun had used it to commit uncharged murders, for which he had been acquitted in state court, resulting in a sentence enhancement from a range of 20-30 years to life imprisonment); *Washington*, 11 F.3d at 1516. The Federal Rules of Evidence (except with respect to privileges) do not apply to sentencing proceedings. See 18 U.S.C. § 3661; 21 U.S.C. § 850; FED. R. EVID. 1101(d)(3); see also U.S.S.G. § 6A1.3.

§ 2D1.1(a)(3) that was not tested at a jury trial or in a guilty-plea proceeding under FED. R. CRIM. P. 11. Moreover, in respondent Booker's case, the district court adjusted the offense level—and thereby enhanced the sentence further—based on its finding that the defendant obstructed justice during his trial testimony. See 04-104 Pet. App. 1a-2a (applying U.S.S.G. § 3C1.1). Similarly, in respondent Fanfan's case, the district court indicated that, but for *Blakely*, it would have found that respondent played an "aggravating role" in the offense under U.S.S.G. § 3B1.1. 04-105 Pet. App. 2a. In short, the government in respondent Booker's case obtained, and in respondent Fanfan's case sought, a sentence that could have been imposed only based on judicial factfinding that went beyond the facts found by the jury or admitted by the defendant.

SUMMARY OF THE ARGUMENT

I. Although Congress may define a range of jury-authorized punishment for any crime, *Blakely* makes clear that where—by application of binding sentencing rules—the jury verdict legally authorizes only a particular amount of punishment, no sentence above that amount may be imposed based on facts found only by a judge. In this respect, the Guidelines are constitutionally indistinguishable from the sentencing provisions at issue in *Blakely*. Like the Washington scheme, the Guidelines allow (and indeed require) judicial factfinding as a predicate for a sentence beyond what would be permitted solely as a result of the jury's verdict (or defendant's admission). The Sixth Amendment forbids such a practice.

The Sentencing Commission's status as a nominally independent administrative agency in the Judicial Branch does not distinguish the cases now before the Court from *Blakely*. There is no indication in *Blakely* that the Sixth Amendment inquiry is controlled by whether sentencing rules are made directly by the legislature or by an agency that the legislature has established and whose pronouncements the legislature has made binding. Even if *Blakely* applies only to legislative acts, moreover, it still controls the cases now before the Court. As the enabling legis-

lation and more than 15 years of practice have shown, the Commission's pronouncements are legislative in character. Whatever independence the Commission nominally had when it was established has been undermined steadily by congressional action. The Commission has been transformed from an entity that was supposed to channel the knowledge of judges and experts into one that frequently serves to channel nothing more than the demands of Congress.

The government attempts to defend the Guidelines by arguing that applying *Blakely* would undermine a central premise of *Mistretta*: that the Sentencing Commission does not vest legislative responsibility in the Judicial Branch for "establishing the minimum and maximum penalties for every crime." 488 U.S. at 396. In *Mistretta*, the Court addressed whether the establishment of the Sentencing Commission violated the separation-of-powers doctrine by involving judges in legislative functions. The present cases and *Blakely*, however, address whether the Guidelines scheme violates the Sixth Amendment by assigning too much power to judges at the expense of juries. The government has conflated two distinct concepts. *Mistretta* addressed only the underlying maximum punishment that a legislature could set, whereas *Blakely* used the phrase "statutory maximum" as shorthand to identify the maximum punishment *authorized by a jury's verdict* (or a defendant's admission at a guilty-plea hearing). Thus, the government's suggestion notwithstanding, there is no reason to hesitate in applying the rule of *Apprendi* and *Blakely* to the Guidelines for fear of weakening *Mistretta*.

Although the government's *Mistretta* argument is miscast, 15 years of experience have brought into question certain assumptions made in *Mistretta*. There is now reason to believe that the reputation of the judiciary for impartiality and nonpartisanship *is* in fact being borrowed by the political branches to cloak their work in the "neutral colors of judicial action." 488 U.S. at 407. There is also now reason to believe that Congress no longer finds the "accumulated wisdom and experience of the Judicial Branch" meaningful in the creation of sentencing

policy. 488 U.S. at 412. Although the cases before the Court provide no occasion to overrule *Mistretta*, its foundations have begun to erode independently of *Blakely* and *Apprendi*.

Contrary to the argument of an ad hoc group of former federal judges in their brief as *amici curiae* in support of neither party ("*amici* Former Judges"), the existence of departure authority under 18 U.S.C. § 3553(b) does not convert a binding guideline system into a system of discretionary judicial sentencing. To impose a lawful sentence outside of an otherwise-applicable guideline range, a judge must find facts sufficient to justify the departure. Such factfinding raises precisely the Sixth Amendment concerns identified in *Blakely*. Moreover, to the extent that *amici* Former Judges are focusing on *downward* departure authority, many cases, including the ones now before the Court, involve facts permitting (or requiring) substantial penalty enhancements, but lack facts justifying the exercise of statutory downward departure authority. *Blakely* should be applied to the Guidelines, not limited or overruled, and the decisions below should be affirmed on the first question presented.

II. The government's non-severability argument is also flawed. The proposed remedy—remands for the district courts to exercise sentencing discretion within the underlying statutes' minimum and maximum terms, while treating the Guidelines as advisory—would have this Court endorse a sentencing system that Congress never intended. The Guidelines were not enacted as a free-standing piece of legislation; they were created as part of an interlocking scheme to reform the sentencing process. In particular, the creation of the Guidelines regime resulted in the abolition of parole, a dramatic reduction in the ability of prisoners to earn good-behavior credit, and the elimination of certain discretionary sentencing provisions. Neither system was intended to function piecemeal. Exposing defendants to sentencing discretion without guideline limits at the front end, and without a parole board's discretion at the back end, not only would be contrary to congressional intent; it would be unfair to criminal defendants. Given the choices available, defendants should be afforded lenity.

From a practical perspective, moreover, the government's proposed remedy raises more questions than it answers. The government says nothing about how the actual sentencing process, including the role of appellate review, would work if the current Guidelines were converted into mere suggestions. A better approach—which would, of course, require Congress's endorsement—would use non-binding guidelines promulgated by judges channeling their actual experience and expertise into advisory sentencing standards. Differential standards of appellate review would encourage judges to hew to the new guidelines and would give rise to a federal common law of sentencing for cases in which the guidelines were not followed. Properly structured and administered, such a non-binding system would be sensitive to differences among offenders, would trust and respect the historic roles of the jury and Article III judges, would control unwarranted sentencing disparities, and would ensure transparency in sentencing.

ARGUMENT

I. THE IMPOSITION OF AN ENHANCED SENTENCE UNDER THE GUIDELINES BASED ON FACTUAL DETERMINATIONS NOT AUTHORIZED BY A JURY'S VERDICT OR A DEFENDANT'S ADMISSION VIOLATES THE SIXTH AMENDMENT RIGHT TO TRIAL BY JURY

In *Blakely*, this Court held that the "statutory maximum for *Apprendi* purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." 124 S. Ct. at 2537 (emphasis omitted). Under the Guidelines' "modified real offense system," judges are permitted—indeed, required—to impose punishment based on facts not found by a jury or admitted by a defendant. See MICHAEL TONRY, SENTENCING MATTERS 93-95 (1996). The Guidelines are thus functionally and constitutionally indistinguishable from the sentencing regime invalidated in *Blakely*, and should meet with the same fate. See *Blakely*, 124 S. Ct. at 2549-50 (O'Connor, J., dissenting).

A. Under the Sixth Amendment (as opposed to, say, the Fifth Amendment's Due Process Clause or the Eighth Amendment), legislatures are virtually unconstrained in defining the scope of punishment authorized by a jury verdict (or its equivalent in the guilty-plea context). See *Blakely*, 124 S. Ct. at 2538 (noting that neither *McMillan* v. *Pennsylvania*, 477 U.S. 79 (1986), nor *Williams* v. *New York*, 337 U.S. 241 (1949), "involved a sentence greater than what state law authorized on the basis of the verdict alone").[4] That is why, for example, a properly defined indeterminate sentencing scheme is not a "judicial impingement upon the traditional role of the jury"; the judicial factfinding under such a scheme does "not pertain to whether the defendant has a legal *right* to a lesser sentence." *Blakely*, 124 S. Ct. at 2540 (emphasis in original).

The Guidelines, in contrast, go beyond what the Sixth Amendment allows by replacing an indeterminate scheme that ultimately *was* grounded in the jury's authority with a determinate scheme that is *not* grounded in that authority. Whereas *Apprendi* ensures that "the judge's authority to sentence derives wholly from the jury's verdict," *Blakely*, 124 S. Ct. at 2539, the Guidelines permit, and often require, judges to enhance sentences based on myriad findings of fact on issues that need not be (and almost invariably are not) considered by the jury. These two approaches are incompatible, and the one created by Congress must yield to the one commanded by the Constitution.

B. The government makes three primary arguments that *Blakely* does not apply to the Guidelines. *Amici* Former Judges offer a different argument in support of that result. None of those defenses of the Guidelines is convincing.

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[4] FAMM believes that mandatory minimum sentences are properly subject to constitutional scrutiny, and that *Harris* v. *United States*, 536 U.S. 545 (2002), and *McMillan* were wrongly decided. *See Harris*, 536 U.S. at 572 (Thomas, J., dissenting) (stating that *McMillan* conflicts with *Apprendi*). FAMM recognizes that the constitutionality of mandatory minimum sentences is not a question presented in the cases now before the Court and does not address that issue in this brief.

1. The government asserts that *Blakely* does not apply because the Guidelines are the administrative product of the Commission, which is "not a legislature but an independent commission in the judicial branch." Br. for the United States ("U.S. Br.") 20. The government suggests that the jury-trial right "applies only to those facts that increase a sentence beyond what the *legislature* has found to be warranted by the elements specified in the statute." *Id.* at 26. That formulation, however, simply begs the question. The government supplies no reason why the Sixth Amendment should not apply to facts that increase a sentence above the maximum that is *legally authorized* in the absence of those facts, whether that maximum was imposed by the legislature itself or by a Commission exercising authority conferred on it by Congress.

a. In the first place, there is no indication in *Blakely* that the Guidelines may be salvageable on the ground that they are promulgated by a nominally independent sentencing commission instead of by Congress directly. See 124 S. Ct. at 2549 (O'Connor, J., dissenting) ("The fact that the Federal Sentencing Guidelines are promulgated by an administrative agency nominally located in the Judicial Branch is irrelevant to the majority's reasoning."). As Judge Posner observed for the majority below, the "Commission is exercising power delegated to it by Congress, and if a legislature cannot evade what the Supreme Court deems the commands of the Constitution by a multistage sentencing scheme neither, it seems plain, can a regulatory agency." 04-104 Pet. App. 4a.[5] The right to trial by jury is secured to the people by Article III and the Sixth Amendment against encroachment by the *state*—not any particular branch of government. What matters for constitutional purposes is not whether sentencing guidelines are promulgated by a legislature directly or by a sentencing commission exercising delegated power, but instead whether those guidelines are binding and permit judges to impose sentences not authorized by a jury's verdict or a defendant's admission.

[5] Indeed, the government itself observed in *Blakely* that "it is not entirely clear that the administrative nature of the Guidelines will insulate them from *Apprendi*." Br. for the United States as *Amicus Curiae* Supporting Respondent at 30, *Blakely* v. *Washington*, No. 02-1632.

b. Even if the promulgating source of the Guidelines were somehow material, the design and actual operation of the Sentencing Commission show that the Guidelines are legislative in nature. Although nominally located in the Judicial Branch, "the Commission is not a court, does not exercise judicial power, and is not controlled by or accountable to members of the Judicial Branch." *Mistretta*, 488 U.S. at 393. The Commission is instead "fully accountable to Congress," *ibid.*, which is entitled to review the Guidelines before they take effect and modify or reject them as it sees fit. See 28 U.S.C. § 994(p).[6]

Moreover, although the rulemaking in which the Commission engages may not involve the enactment of statutes, it is legislative in every other meaningful sense. The Guidelines—along with the statutory provisions that make them binding and provide appellate review of sentencing determinations—are legislative pronouncements that create entitlements to a certain range of sentences in particular factual circumstances. See Stith & Koh, *supra*, 28 WAKE FOREST L. REV. at 270 (in enacting the appellate review provisions of the Sentencing Reform Act, Congress acknowledged "the Commission's power to make new law restricting sentencing authority"). This Court has recognized that the Guidelines "are the equivalent of legislative rules." *Stinson*, 508 U.S. at 45. That is why, as the government concedes, changes in the Guidelines are subject to the Ex Post Facto Clause, which does

[6] Before passing the Sentencing Reform Act, Congress considered a guidelines regime that would have "'assign[ed] the task of developing guidelines to the Judicial Conference." Stith & Koh, *supra*, 28 WAKE FOREST L. REV. at 236 (quoting H.R. REP. NO. 96-1396 471, 484 (1980) (remarks of Representative Rodino)). That approach was rejected in favor of a bill similar to what was enacted as the Sentencing Reform Act of 1984.

not apply to judicial decisionmaking. U.S. Br. 24-25; cf. *Garner* v. *Jones*, 529 U.S. 244, 258 (2000) (Scalia, J., concurring).[7]

The legislative nature of the Guidelines has been confirmed and further underlined by more than 15 years of experience. Over the years, Congress has dictated its will to the Sentencing Commission on many occasions. Beginning soon after *Mistretta* was argued, and with increasing frequency later, Congress has directed the Sentencing Commission to amend the Guidelines, in specified ways, more than 50 times.[8] In 2003, Congress directly enacted new guidelines itself, cutting the Commission out of the process altogether. See PROTECT Act § 401(i). The PROTECT Act arrived not long after the Department of Justice took the position that "we believe the sentencing commission exists to effectuate the express will of Congress." United States Sentencing Commission, 2002 Public Hearing (Mar. 19, 2002) (testimony of then-Deputy Attorney General Larry D. Thompson). As two commentators have observed, these developments have effectively turned the Commission into "an empty shell, or the equivalent of a congressional committee staff." Jeffrey Parker & Michael Block, *The Limits of Federal Sentencing Policy, or Confessions of Two Reformed Reformers*, 9 GEO. MASON L. REV. 1001, 1022 & n.97 (2001) (noting that one of the Commission's primary tasks in the 1990s has been responding to congressional legislation).[9]

[7] The ordinary rules of administrative review do not even apply to the Commission. Although the Commission is required to use notice-and-comment procedures for guideline amendments, its rulemaking is not otherwise subject "to any other provision of the APA, including those for judicial review." *United States* v. *Lopez*, 938 F.2d 1293, 1297 (D.C. Cir. 1991).

[8] The first congressional directive to the Sentencing Commission was issued on November 18, 1988, approximately six weeks after *Mistretta* was argued, in Pub. L. No. 100-690, § 6453, 102 Stat. 4181, 4382 (1988). See 28 U.S.C. § 994 note; U.S.S.G., App. C, amend. 134. Before passage of the Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today (PROTECT) Act, Pub. L. No. 108-21 (2003), the Guidelines Manual identified 28 U.S.C. § 994(a)—part of the enabling legislation establishing the Commission—as the source of its amendment authority. See, *e.g.*, United States Sentencing Commission, *Guidelines Manual* (Nov. 2002 ed.). After the PROTECT Act, the Commission amended Chapter One of the Guidelines Manual to state that ongoing congressional directives constitute a source of amendment authority independent of 28 U.S.C. § 994(a). U.S.S.G. § 1A1.1 (Nov. 2003 ed.).

Against this backdrop, the Commission's nominal independence cannot insulate the Guidelines regime from *Blakely*'s reach. There is no plausible reason why a guideline range enacted directly by Congress should be treated any differently—for Sixth Amendment purposes—from one that Congress orders the Commission to enact, or one that the Commission enacts with tacit congressional approval. By virtue of 18 U.S.C. § 3553(b), each has the same effect on the sentencing court and on the ultimate sentence that lawfully may be imposed on the defendant. In short, a guidelines scheme in which the legislature is as intimately involved as it is in the current federal regime cannot be distinguished from the Washington sentencing provisions, except through an elevation of form over substance, which this Court's Sixth Amendment cases have consistently rejected. See *Ring*, 536 U.S. at 604 ("the relevant inquiry is one not of form, but of effect") (quoting *Apprendi*, 530 U.S. at 494).

c. Even under a more formalistic approach that insists on direct legislative action to trigger the application of the Sixth Amendment, cf. 04-104 Pet. App. 21a-23a (Easterbrook, J., dissenting), *Blakely*'s reasoning would still apply to the Guide-

[9] Congress affirmatively has rejected the Commission's expert recommendations as well. In 1995, the Commission proposed amendments designed to address the dramatic penalty disparities between offenses involving what is commonly known as crack cocaine and powder cocaine. Congress disapproved those amendments. See Pub. L. No. 104-38, § 1, 109 Stat. 334 (1995). The Commission subsequently has issued reports for congressional consideration setting forth alternatives to the statutory penalty scheme concerning those drugs, but Congress has not acted on them. See United States Sentencing Commission, *Report to the Congress: Cocaine and Federal Sentencing Policy*, Executive Summary at v (May 2002) (available at http://www.ussc.gov/r_congress/02crack/2002crackrpt.htm).

lines. By statute, Congress directed the Commission to establish "guidelines * * * for use of a sentencing court in determining the sentence to be imposed in a criminal case." 28 U.S.C. § 994(a)(1). By statute, those guidelines must "establish a sentencing range," *id.* § 994(b)(1), which must be capped such that the maximum "shall not exceed the minimum of that range by the greater of 25 percent or 6 months," *id.* § 994(b)(2). Capped ranges are what forbid judges from sentencing defendants to the maximum penalty authorized by the statute underlying the conviction without engaging in factfinding beyond facts found by the jury. And such ranges are binding on courts only because Congress made them so in 18 U.S.C. § 3553(b) and ensured in § 3742 that unauthorized departures will be reversed on appeal. Although Congress left the details to the Commission, the core architecture of the Guidelines system—including those features that render the system most problematic under the Sixth Amendment—is contained in the Sentencing Reform Act and subsequent Acts. If statutes are indeed required to trigger *Blakely*'s application, therefore, the Guidelines are sufficiently creatures of statute to fall within *Blakely*'s sway.

2. The government next tries to distinguish the Washington sentencing regime on the ground that it—unlike the Guidelines—created "grades of statutory offenses" analogous to "federal statutes that set three different maximum penalties for an offense depending on the presence or absence of certain aggravating facts." U.S. Br. 26-27; see, *e.g.*, *Jones* v. *United States*, 526 U.S. 227 (1999). This purported distinction fundamentally misconstrues the Washington scheme.

Unlike the federal statutes to which the government tries to analogize, Washington's sentencing scheme does not make the increased penalty turn on some specific fact that the legislature has deemed relevant. Instead, it makes the departure turn on "*any* aggravating fact," without attempting to catalogue exhaustively the types of findings that would justify an enhanced sentence. *Blakely*, 124 S. Ct. at 2538. Despite the government's suggestion, therefore, the factual findings relevant in Washington are *not* "limited" in number (U.S. Br. 27) and do *not*

"'divide crimes into narrow degrees and standard categories,'" *id.* at 28 (quoting *United States* v. *Emmenegger*, No. 04-CR-334, 2004 WL 1752599, at *16 (S.D.N.Y. Aug. 4, 2004)). What is more, the Washington scheme specifically *prohibits* "reliance by sentencing courts upon facts that would constitute the elements of a different or aggravated offense." *Blakely*, 124 S. Ct. at 2550 (O'Connor, J., dissenting) (quoting Wash. Rev. Code. Ann. § 9.94A370(2)). In other words, the one factual finding that Washington courts may *not* rely on to enhance a sentence beyond the otherwise-applicable maximum is one that would effectively create a stepped-up grade of statutory offense.

To be sure, the Guidelines are based on a modified "real offense" system of punishment, and they include concepts, such as "relevant conduct," that do not fit into standard classifications of offense elements. The kinds of factual findings that Washington judges made to sentence beyond the standard range tended to be less specific and more open-ended than are many of the specific factual findings on which federal Guidelines enhancements are based. Cf. Kate Stith & José Cabranes, *Judging Under the Federal Sentencing Guidelines*, 91 NW. U. L. REV. 1247, 1254 (1997) ("Each step of a sentencing calculation under the Guidelines represents what mathematicians call a 'minimal pair': The judge must decide whether a given factor deemed relevant by the Sentencing Commission is present or absent in the case at hand."). But that type of distinction, as the Court specifically concluded in *Blakely*, is "immaterial" for Sixth Amendment purposes, 124 S. Ct. at 2538, and thus provides no basis for distinguishing the Guidelines from their Washington counterparts.[10]

3. The government, in its effort to defend the Guidelines, goes so far as to assert that applying *Blakely* would "undermine

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[10] If anything, the "soft constraints" employed by the Washington system are more constitutionally defensible than are the "hard constraints" of the Guidelines, which call for factual findings that would be relatively easy for juries to make. *Blakely*, 124 S. Ct. at 2550 (O'Connor, J., dissenting).

one of the central premises of *Mistretta*: that the Sentencing Commission does not vest in the Judicial Branch the legislative responsibility for 'establishing the minimum and maximum penalties for every crime.'" U.S. Br. 38 (quoting *Mistretta*, 488 U.S. at 396); *id.* at 63-66. That argument ignores crucial distinctions between *Mistretta,* on the one hand, and *Blakely* and the cases now before the Court, on the other.

a. In *Mistretta*, the Court addressed the argument that the establishment of the Sentencing Commission violated separation-of-powers principles by involving judges in functions that are the special responsibility of the Legislative Branch. In that context, the Court was concerned with the constitutional allocation of power between the Judicial and the Legislative Branches. Like *Blakely*, however, the cases before the Court address a very different problem: whether the Guidelines scheme assigns too much power to judges at the expense of juries in violation of the Sixth Amendment. See 124 S. Ct. at 2540 (the Sixth Amendment "limits judicial power *only* to the extent that the claimed judicial power infringes on the province of the jury"). *Mistretta*, of course, did not involve a Sixth Amendment challenge, and the Court thus had no occasion to consider whether the Guidelines create constitutional problems by usurping the role of the jury as a "circuitbreaker in the State's machinery of justice." *Id.* at 2539.

Given the different constitutional issues presented in the cases, there is no reason to believe that *Blakely*'s definition of "statutory maximum" as the most severe sentence that a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant, 124 S. Ct. at 2537, means the same thing as "maximum penalt[y] for [a] crime" as that phrase was used in *Mistretta*. The latter concept denotes the maximum sentence that a defendant may *possibly* receive for committing a particular crime; the former denotes the maximum sentence that a defendant may receive without further authorization by a jury. Under the existing federal sentencing scheme, these concepts are not the same.

The phrase "statutory maximum" appears to have been used in *Apprendi* because the question there involved purely legislative sentencing provisions. As *Blakely* implies, however, that phrase is best understood as a term of art identifying what is constitutionally permissible in the division of factfinding authority between judge and jury. To illustrate: the state statutory provisions at issue in *Blakely* did not make the maximum penalty for second-degree kidnapping with a firearm 53 months. Instead, 53 months was merely the maximum sentence that could be imposed without any additional judge-made findings. 124 S. Ct. at 2537. A defendant could be convicted of that crime and lawfully sentenced to 10 years so long as the additional findings were authorized by a jury. So it is here. The Sentencing Commission does not set the ultimate maximum possible penalty for every crime, but it surely *does* set penalties that a judge may exceed only by making further findings of fact without a jury's authorization. *Blakely* thus may be applied to the Guidelines, as its logic suggests that it must be, without weakening *Mistretta* or calling into doubt its dictum about the nature of the Commission's work.[11]

b. Although the government's *Mistretta* argument is miscast, 15 years of experience since *Mistretta* have brought into question certain other assumptions the Court made in that case. As described above, Congress frequently pays no attention to the Commission's nominal independence. For example, instead of letting the Commission produce amendments based on care-

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[11] Faced with *Blakely*'s clarity, the government ultimately retreats and asks this Court to reconsider the case. U.S. Br. 41. That argument boils down to a claim that it would be better to reconsider one case (*Blakely*) than to call into question four cases (*United States* v. *Dunnigan*, 507 U.S. 87 (1993); *Witte* v. *United States*, 515 U.S. 389 (1995); *United States* v. *Watts*, 519 U.S. 148 (1997) (per curiam); and *Edwards* v. *United States*, 523 U.S. 511 (1998)). U.S. Br. 41. But the Sixth Amendment issue in *Apprendi* and *Blakely* was not decided by the Court in *Dunnigan*, *Witte*, *Watts*, or *Edwards*. Each of those four cases would be subject to the rule of *Apprendi* and *Blakely* if decided today. And there is nothing ignoble about recognizing their supersession by a doctrine not addressed in any of them.

ful study, and then exercising its oversight responsibility under the review scheme set forth in the enabling legislation—see 28 U.S.C. § 994(p); *Mistretta*, 488 U.S. at 412 ("The Constitution's structural protections do not prohibit Congress from delegating to an expert body located within the Judicial Branch the intricate task of formulating sentencing guidelines")—Congress regularly dictates its immediate policy judgments to the Commission through specific directives and, in the case of the PROTECT Act, actual amendments to the Guidelines. See pp. 12-13 & n.8, *supra*. Those practices give rise to serious concerns that the judiciary's reputation for impartiality and nonpartisanship—which the Court in *Mistretta* decided was not brought into question by the legislation under review—*is* in fact being "borrowed by the political Branches to cloak their work in the neutral colors of judicial action." 488 U.S. at 407; see also Parker & Block, *supra*, 9 GEO. MASON L. REV. at 1024 ("this type of legislation obviously makes the Commission's job of systematic rationalization of sentences more difficult, and tends to reinforce a misconception of the Commission" as an agency that "exists to carry out the transitory political will").

Developments since *Mistretta* have also brought into question whether the Commission meaningfully "call[s] upon the accumulated wisdom and experience of the Judicial Branch in creating policy on a matter uniquely within the ken of judges." 488 U.S. at 412. Along with Congress's practice of dictating guideline amendments, Congress amended 28 U.S.C. § 991(a) to provide that the Commission may function by law without even a single judge as a member, thus making the Commission's already marginal connection to the Judicial Branch even more tenuous. See PROTECT Act § 401(n). That enactment in itself suggests that judicial wisdom and experience, from Congress's perspective, may have lost their luster when it comes to the formulation of sentencing policy. See David Zlotnick, *The War Within The War On Crime: The Congressional Assault on Judicial Sentencing Discretion*, 57 SMU L. REV. 211, 231-32 (2004) (the PROTECT Act illustrates "just how Congress has abandoned its original conception of the

Sentencing Commission"). Thus, although there is no occasion to reconsider *Mistretta* in the present cases, its foundations have begun to erode quite independently of *Apprendi* and *Blakely*.[12]

4. Like the government, *amici* Former Judges "urge this Court to uphold the constitutionality of the Guidelines." Judges' Br. 5. According to *amici* Former Judges, a sentencing judge's ability to depart from an otherwise-binding guideline range means that "the federal scheme does not implicate a defendant's right to have a jury decide facts that may increase a sentence pursuant to the holding announced in *Blakely*." Judges' Br. 6. That argument is flawed for at least two reasons.

First, the Washington system at issue in *Blakely* operated in all relevant respects much like the departure provisions of the Guidelines. See *Blakely*, 124 S. Ct. at 2549 (O'Connor, J., dissenting) (describing the two systems as "almost identical").[13]

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[12] The relationship between Congress and the Judicial Branch with respect to sentencing issues has suffered other strains. Recently, Congress required the Commission to gather judge-specific sentencing information and report statistics to Congress derived from that information. See 28 U.S.C. § 994(w). Enacted as part of the PROTECT Act, that provision has been the source of controversy. As Chief Justice Rehnquist noted, "it seems that the traditional interchange between the Congress and the Judiciary broke down when Congress enacted what is known as the PROTECT Act." 2003 Year-End Report on the Federal Judiciary (available at http://www.supremecourtus.gov/publicinfo/year-end/2003year-endreport.html).

[13] Both sche allow judges to go beyond the otherwise-applicable (and binding) sentencing range on findings of aggravating circumstances that make the particular case more severe than the usual case. In each case, the scheme provides only general criteria for when a departure may be justified. Compare Wash. Rev. Code. Ann. § 9.94A.120(2) ("substantial and compelling reasons justifying an exceptional sentence") with U.S.S.G. § 5K2.0(a)(1)(B) (existence of "an aggravating circumstance, of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that * * * should result in a sentence different from that described"). Both schemes require judges to make factual findings and set forth their reasons for departing. Compare Wash. Rev. Code. Ann. § 9.94A.120(3) with U.S.S.G. § 5K2.0(e). It is thus no accident

Under the Guidelines, an upward departure from an otherwise-applicable guideline range, just like an enhancement based on "relevant conduct," derives from factual findings not made by a jury or admitted by a defendant. See *Koon* v. *United States*, 518 U.S. 81, 99-100 (1996) (describing the considerations that go into the departure decision as "factual matters"). Even when exercising departure authority, therefore, a judge may impose a sentence beyond the maximum authorized by the jury's verdict (or a defendant's admission) only by making additional findings of fact. The existence of that authority thus in no way distinguishes the Guidelines regime from the regime at issue in *Blakely*. See 124 S. Ct. at 2537 ("[T]he relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings.").

Second, insofar as the Former Judges contend that a sentencing court's ability to depart *downward* distinguishes the Guidelines from the scheme at issue in *Blakely*, they ignore the reality that in many (if not most) cases a factual basis for a departure from the applicable guideline range is simply not available. Indeed, a court's theoretical downward-departure authority under 18 U.S.C. § 3553(b) has no bearing on the application of the Sixth Amendment to a particular case in which (1) an enhanced sentence is based on facts not found by the jury or admitted by the defendant; and (2) no basis for the exercise of downward departure authority under § 3553(b) exists. The two cases before the Court appear to meet both of those criteria.

A sentencing court's ability to depart from an otherwise-applicable guideline range is closely circumscribed. "In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission." 18 U.S.C. §3553(b); see also U.S.S.G. § 5K2.0. This Court's decision in *Koon*—holding that judges

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that the Court in *Blakely* used the term "departure" to describe the "deliberate cruelty" enhancement at issue in that case. 124 S. Ct. at 2535.

may depart in cases outside the "heartland" of the Guidelines; that departures should be reviewed by appellate courts under an abuse-of-discretion standard; and that departure decisions "will in most cases be due substantial deference" (518 U.S. at 98)—did not (and could not) affect the core restrictions imposed by § 3553(b). "In the wake of *Koon*, as before *Koon*, the main question on appeal of a departure continues to be whether the Sentencing Commission had already taken into account the circumstances that the sentencing judge has identified as warranting departure in the particular case." Stith & Cabranes, *supra*, 91 NW. U. L. REV. at 1280. "As it happens, the Sentencing Commission has already considered, and the Sentencing Guidelines have already factored in, many if not all circumstances that are arguably relevant to criminal sentencing; this micro-management is one of the Guidelines' most notable features." *Ibid.*[14]

Given the strictures and the sweep of 18 U.S.C. §3553(b), the Former Judges err in asserting that invariably the Guidelines "do not compel a sentencing judge to impose the Guidelines-determined sentence." Judges' Br. 14. The Guidelines often *do* have that precise effect—as was their aim—both in Circuits with relatively low departure rates and in Circuits with relatively high departure rates. The departure provisions, as written and as applied, give judges insufficient discretion to alleviate the Sixth Amendment concerns raised by applications of the Guidelines.[15] Thus, while FAMM agrees that "the

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[14] The PROTECT Act abrogated *Koon* in part by mandating a *de novo* appellate standard of review for certain core components of departure decisions. PROTECT Act § 401(d)(2).

[15] The insufficiency of theoretical possibilities for departure as a basis on which to distinguish the Guidelines regime from the scheme in *Blakely* is even more apparent after the PROTECT Act. As the Former Judges recognize, that Act "reduced the discretion of district court judges by limiting the availability of combination-of-factors departures [under USSG § 5K2.0]" and by dictating the boundaries of potential departures in certain cases involving sexual offenses against children. Former Judges' Br. 18 n.2. But the PRO-

principal goal of any sentencing scheme should be to do justice to each individual who comes before the bar of justice," Judges' Br. 24, the current Guidelines fall well short of that goal. As applied under the Sentencing Reform Act, they are also unconstitutional.

II. THE GOVERNMENT'S PROPOSED REMEDY WOULD REQUIRE THE COURT TO ENDORSE A SENTENCING SYSTEM THAT CONGRESS DID NOT INTEND, WOULD BE UNFAIR IN ITS APPLICATION, AND IS IMPRACTICABLE

If the Court follows through on *Blakely*'s logic and applies its reasoning to the Guidelines, it is all but inevitable that a new sentencing regime will have to be devised to fill the place once occupied by the Guidelines. To that end, the government suggests that the existing Guidelines "must rise or fall as a whole" if *Blakely* is held to apply (U.S. Br. 66) and that the Guidelines in that event should continue to be used, pending congressional action, as a set of purely advisory recommendations. *Id.* at 44, 69. Both parts of that proposal are flawed.

A. The government's non-severability argument and its proposed remedy are geared toward staving off truncated applications of the Guidelines and jury determinations of facts made relevant by the Guidelines. U.S. Br. 49-63. The primary problem with the government's proposal is that it would create—in the name of effectuating Congress's intent—a

TECT Act did much more. In addition to abrogating *Koon* as to the applicable standard of review in some respects, it also "forbade the Sentencing Commission from adding any new departure grounds for two years, instructed the Sentencing Commission to amend the guidelines and policy statements to substantially reduce the incidence of downward departures, and lastly, directed the Department of Justice to assist in this endeavor." Zlotnick, *supra*, 57 SMU L. REV. at 236 (citing PROTECT Act § 401). The PROTECT Act thus represents a transparent effort by Congress to minimize the frequency of departures from Guideline-mandated sentencing ranges. See Marc Miller, *Domination and Dissatisfaction: Prosecutors as Sentencers*, 56 STAN. L. REV. 1211, 1241-51 (2004) ("It is hard * * * to see the PROTECT Act as anything less than a foundational realignment of the federal sentencing system.").

sentencing regime never contemplated by Congress. The Guidelines are not a free-standing piece of legislation, but were developed over several years as an integral component of comprehensive federal sentencing reform. The Sentencing Reform Act of 1984 effected a host of substantive changes in the sentencing process, including new provisions for incarceration, supervised release, probation, fines, and forfeitures. See Stanley A. Weigel, *The Sentencing Reform Act of 1984: A Practical Appraisal*, 36 UCLA L. REV. 83, 84 (1988). In addition, the Act abolished parole in the federal system, mandating that prisoners should serve the full length of their sentences, with only the possibility of a 15-percent reduction for good behavior. Compare 18 U.S.C. § 3624(b) with 18 U.S.C. § 4161 (repealed). It also eliminated an oft-used provision of the Federal Rules allowing judges to reconsider their sentences, on a discretionary basis, within 120 days after the sentence became final. FED. R. CRIM. P. 35(b) (former version). Yet Congress decreed that none of these provisions would take effect until the effective date of the Guidelines. See Pub. L. No. 98-473, § 235, 98 Stat. 1837 (1984).[16]

Congress had two overriding goals in enacting comprehensive sentencing reform: (1) controlling sentencing disparities by reducing judicial discretion in imposing sentences; and (2) creating "truth in sentencing" by reducing executive discretion to release prisoners before the end of their sentences. Breyer, *supra*, 17 HOFSTRA L. REV. at 4-5. The former goal underlay the establishment of the Sentencing Commission and the Guidelines; the latter led to the abolition of parole and the limits on good-time credits. *Ibid.* These reforms worked in tandem: the Guidelines addressed the front end of the sentencing process; the abolition of parole addressed the back end. Together, they were designed to transform federal sentencing from a process built on individualized discretion to one built on standardized rules of general applicability, and neither was in-

[16] The basic statute governing parole eligibility, 18 U.S.C. § 4205, was repealed effective November 1, 1987, when the Guidelines became effective.

tended to stand alone. See Frank Bowman, III, *Train Wreck? A Plea for Rapid Reversal of* Blakely *v.* Washington, 41 AM. CRIM. L. REV. ___ (forthcoming) (typescript at 29) ("The congressional decision to eliminate regularized back-end release authority and substitute determinate sentences and supervised release can only be understood in the context of the simultaneous implementation of sentencing guidelines for district judges and appellate review of guidelines sentencing decisions, which were designed to operate together to drastically reduce front-end inter-judge sentencing disparities.").

The government cites the rule that "'[t]he inquiry into whether a statute is severable is essentially an inquiry into legislative intent.'" U.S. Br. 44 (quoting *Minnesota* v. *Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 191 (1999)). But that very rule undermines the proposal that the government asks this Court to adopt. Congress did not intend to create a sentencing system in which judges exercise virtually unfettered discretion at the front end to impose sentences anywhere between the underlying statutory minimum and maximum, but in which there is no mechanism to reduce the effects of sentencing disparities at the back end. As Professor Alschuler puts it, "instituting a system of judicial sentencing discretion without the check provided by the Parole Commission would not resurrect the pre-Guidelines regime. It would instead create a sentencing system unlike any that has previously existed in the federal courts." Albert W. Alschuler, *To Sever or Not to Sever? Why Blakely Requires Action By Congress*, 17 FED. SENT. RPTR. __ (forthcoming Oct. 2004) (available at http://sentencing.typepad.com/sentencing_law_and_policy/2004/08/professor_alsch.html).

The logic of the government's own severability analysis thus would require a total return to the pre-Guidelines system. The question as framed by the government is not whether certain aspects of the Guidelines are severable from other aspects but whether the unconstitutional aspects of the Sentencing Reform Act and its implementing rules (including the Guidelines) may be severed from the rest of the statutory structure. Should

one pillar of the integrated reform package devised by Congress be eliminated, consistency and respect for legislative design demands that the others be removed as well.[17]

A severability analysis that stops at the Guidelines is not just illogical. Fundamental fairness also forbids such a limit. The government endorses a result that would expose defendants to greater sentencing risk than they would have borne under any sentencing regime that actually has ever existed. They would face virtually unchecked judicial discretion, as in the pre-Guidelines system, but would be forced to serve their sentences without the opportunity for discretionary sentence reductions, broad good-behavior provisions, and recourse to a parole commission that was integral in mitigating the sometimes harsh consequences of a judge's sentencing discretion. See William Genego, Peter Goldberger, & Vicki C. Jackson, *Parole Release Decisionmaking and the Sentencing Process*, 84 YALE L.J. 810, 823 (1975). Moreover, although the government says nothing about it, the supervised release provisions codified in 18 U.S.C. § 3583, if left in place without binding Guidelines, would impose a still further restraint on liberty in a way never imagined by Congress.

Therefore, if the choice (pending possible congressional action) is either a truncated guideline system or the system advocated by the government, the Court should opt for the former. There is no reason why defendants sentenced without the constraints of the Guidelines should lack the protections of the system that the Guidelines made obsolete. Adopting the government's artificially constrained severability analysis would create a regime no more legislatively authorized—and significant-

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[17] The government once recognized this point. In a brief filed when *Mistretta* was pending decision, the Solicitor General observed that "[i]f the Court should strike down the sentencing guidelines established by the Sentencing Reform Act in *United States* v. *Mistretta*, * * * it may also conclude that other provisions of the Act are not severable, including the provisions repealing Section 4205." Br. for the United States in Opposition to Petition for Writ of Certiorari, *Ruggiano* v. *United States*, No. 88-367.

ly less fair to criminal defendants—than one in which only the unconstitutional features of the Guidelines are struck down, or one in which the Guidelines are applied based on factfinding by juries rather than judges. In a world of second-bests, the defendant should be afforded lenity.

B. The government's proposed remedy—transforming the current Guidelines into a set of non-binding sentencing recommendations—is also impracticable. Although advisory guidelines are a constitutionally acceptable alternative to the present regime (and properly designed, a desirable one), a true *Blakely*-compliant system of advisory guidelines must be built from the ground up. The government, apparently, would have them emerge from what is left of the Guidelines, through a Sentencing Commission with an uncertain mandate.

1. Despite (or perhaps because of) its seeming simplicity, the government's proposal raises many more questions than it answers. The government does not address what the mechanics of sentencing would look like if the current Guidelines were transformed into mere suggestions. Would district court judges still be required to go through the complex procedures required under Guidelines sentencing? Would probation officers still write technical pre-sentence reports calculating a Guidelines sentence? What, if anything, would be the consequence if a judge chose to disregard either the procedures or the results of guideline recommendations? If a judge erred in calculating a non-binding guideline sentence (whether by making an unsupported factual finding or by misinterpreting some provision of the Guidelines) would the defendant or the government be able to appeal that mistake? Indeed, the government says nothing about the availability or scope of appellate review under its proposed remedy, or whether the exercise of sentencing discretion would be given "virtually unconditional deference on appeal," as was the case before the Sentencing Reform Act of 1984. *Mistretta*, 488 U.S. at 364.

Nor does the government address the Sentencing Commission's role in a world of advisory guidelines in which its

pronouncements likely would have virtually no legal significance. Would the Commission continue proposing and issuing guideline amendments? Would it have the authority to correct mistaken or conflicting interpretations of the Guidelines made by judges who attempted to hew their sentences to the advisory guidelines? See *Braxton* v. *United States*, 500 U.S. 344, 348 (1991) (noting that such clarification is an important service played by the Commission in ensuring sentencing uniformity).

Against this backdrop, it is rather ironic for the government to attack a remedy that would require jury determinations under the existing Guidelines on the ground that "there is ample reason to conclude that Congress and the Commission did not intend for the system to function in such a manner." U.S. Br. 59. Those objections, of course, apply equally well to a system in which the existing Guidelines are turned into nothing more than recommendations that courts are free to disregard at will.

A system that leaves the Guidelines in place without offering judges any incentives to pay attention to them creates the worst of all worlds. That approach would compromise the laudable goal of minimizing sentencing disparities while perpetuating the least desirable features of the Guidelines regime—its numbing complexity, procedural unfairness, and bureaucratization of the judicial function. See Stith & Cabranes, *supra*, 91 NW. U. L. REV. at 1263 (noting how the Guidelines make sentencing "dry, complicated, mechanistic, and frequently incomprehensible to courtroom observers, including the parties"); TONRY, *supra*, at 98 ("One of the commission's worst blunders was promulgation of the forty-three level sentencing grid * * * giving an appearance of arbitrary sentencing by numbers * * *."). The ruins of the existing Guidelines provide a most undesirable site on which to build a truly fair and effective set of advisory guidelines.

2. The better approach—ultimately, of course, one that would require Congress's endorsement—is to use non-binding guidelines as part of a new sentencing regime, one that trusts and respects the historic roles of the jury and Article III judges

and is sensitive to differences among offenders, while still controlling unwarranted sentencing disparities by creating incentives for judges to follow a uniform set of principles in formulating their sentences. In its broad outlines, such a system would look something like this:

First, it would have non-binding guidelines as its centerpiece with fewer severity levels. By making the calculation of sentencing ranges easier and less cumbersome, the system would reduce errors, and sentencing would become less rigid and machine-like. TONRY, *supra*, at 98-99. That, in turn, would increase transparency and give the new system greater legitimacy in the eyes of judges, defendants, and the public at large. Such respect is essential, particularly for non-binding guidelines. See *id.* at 98 (noting that judges who are alienated from an overly mechanical guidelines grip are "unlikely to invest great effort in protecting the integrity of the system").

Second, the guidelines should be promulgated by judges alone—perhaps by a body formed out of the Judicial Conference. Not only would this help minimize the political interference that has plagued the current Guidelines, but giving district judges more of an institutional stake in the guidelines would make them more likely to abide by those standards, even if they were not compelled to do so by law. Cf. KATE STITH & JOSÉ CABRANES, FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS 174-75 (1998) (proposing a similar system). Many proponents of sentencing reform before 1984 advocated just such an approach. See Stith & Koh, *supra*, 28 WAKE FOREST L. REV. at 236; see also *supra* note 6.

Third, sentencing determinations under such a new regime would be subject to meaningful appellate review designed to control unwarranted sentencing disparities and create a common law of sentencing. All sentencing decisions would be justified by specific findings and conclusions, crystallized by a statement of reasons (cf. 18 U.S.C. § 3553(c)) and would be subject to appellate scrutiny. Judicial findings of fact would be made according to appropriately stringent burdens of proof.

Although judges would not be required to abide by the advisory guidelines, an additional incentive for them to do so would come in the form of differential standards of review depending on whether a sentence was imposed based on the guidelines. A sentence conforming to the guidelines would be appealable only on the ground that the court miscalculated the guideline range, whether by making a legal error about the applicability of a particular guideline or by making a factual error about some issue relevant to the guideline determination. A *de novo* standard of review would apply to legal and mixed questions; a clearly-erroneous standard would apply to findings of fact. But sentences within the range would otherwise be virtually unreviewable.

In contrast, a judge who chose to impose a sentence outside of the guideline range would be subject to more searching review on appeal. The sentence could be vacated unless the court of appeals was satisfied that it had been tailored carefully to meet both the criteria stated by the sentencing court judge and the basic principles of federal sentencing law—akin to those currently set out in 18 U.S.C. § 3553(a) (identifying factors critical to sentencing determinations, including the importance of a defendant's history and characteristics, the seriousness of the offense, the need to protect the public, the need to deter similar conduct, and needs of the defendant).[18]

Such a strict standard—and the increased chance of reversal that it would bring—would create a strong incentive for judges to follow the new guidelines in most cases. See generally David Klein & Robert Hume, *Fear of Reversal as an Explanation of Lower Court Compliance*, 37 LAW & SOC'Y REV. 579,

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[18] Paramount among these philosophical touchstones of sentencing is the principle of parsimony. As recognized in § 3553(a), but as first articulated in 1764 by Cesare Beccaria in time to influence Enlightenment thinkers like the Framers, punishment should always be "not greater than necessary." See GARRY WILLS, INVENTING AMERICA 94 (1979) (discussing impact of Beccaria on Jefferson); DAVID MCCULLOUGH, JOHN ADAMS 66-67 (2001) (discussing John Adams's use of Beccaria's ideas).

581-82 (2003). The result would be a system in which sentencing uniformity would be maximized without either compromising the ideal of individualized justice or running afoul of the Sixth Amendment. Finally, allowing appellate courts the opportunity to shape sentencing policy on a case-by-case basis would give rise to a common law of sentencing, which over time would help ensure increased consistency in sentencing even in cases where judges chose not to follow the guidelines. Cf. *Ornelas* v. *United States*, 517 U.S. 690, 697 (1996) (stating that reviewing reasonable suspicion and probable cause determinations *de novo* "tends to unify precedent" and comes closer to providing a set of standards that facilitate correct determinations in advance).

Properly structured and administered, such a system would result in a sentencing regime that the current Guidelines system promised but failed to deliver. Judges would actually have discretion in all cases to impose a sentence "sufficient, but not greater than necessary," to comply with the purposes of sentencing. See 18 U.S.C. § 3553(a). And the public, the government, and criminal defendants alike would actually have the benefit of "the accumulated wisdom and experience of the Judicial Branch in creating policy on a matter uniquely within the ken of judges." *Mistretta*, 488 U.S. at 412.

CONCLUSION

In No. 04-104, the judgment of the court of appeals should be affirmed. In No. 04-105, the judgment of the district court should be affirmed.

Respectfully submitted.

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